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Jeffrey S. Wolfe

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## ESSAY

### EXPLORING TRIAL ADVOCACY: TRADITION, EDUCATION, AND LITIGATION

Jeffrey S. Wolfe\*

#### I. INTRODUCTION

Trial advocacy is an art riddled with the paths of past exploration. As advocates, we must continuously search these paths to glean a greater understanding of effective courtroom techniques. Accomplishing this goal will require an examination of the skills demanded of the advocate as well as the methods utilized to acquire those skills. Central to the inquiry is the entire spectrum of lawyer training, from pre-law through law school, to the practical training received by members of the practicing bar. Essentially, this effort compares the roles of each as they contribute to overall courtroom competency.

This article also examines and contrasts the skills which these three stages of lawyer development have traditionally emphasized, together with the educational opportunities for direct exposure to litigation possessed by each. Thus, the analysis is three-pronged. It looks to the lessons of the past, to the potential of the future, and to the substantive exposure of the courtroom itself. Only through such an analysis can one truly arrive at the necessary skills of advocacy and the emphasis which has been or should be placed on their acquisition.

As a starting point, we look to the advocate and suggest that the state of trial advocacy today is sadly deficient. Black's Law Dictionary defines the *advocate* as "one who assists, defends or pleads for another; one who renders legal advice and aid and pleads the cause of another

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\* Assistant City Prosecutor, Tulsa, Oklahoma; Adjunct Assistant Professor of Law, University of Tulsa; A.B., University of California, San Diego; J.D., California Western School of Law; member of the California and Oklahoma bars.

before a court or tribunal.”<sup>1</sup>

‘Litigation’ derives from two Latin words, *litis* and *ago*. The first, *litis*, means contention, strife, a quarrel. *Ago* means “to go.” So, apparently, *litigo*—from which we get our work *litigate*—originally meant to “go to it” in a quarrel, or to carry on a quarrel, to dispute, to engage in strife, to brawl—and later, “to go to law” in the sense in which that phrase is now popularly used. And *litigiosus*, whence our word “litigious,” referred to a person full of strife. Litigation, then is strife. A law-suit is a kind of fight or combat.<sup>2</sup>

More commonly, we know *litigation* to mean a “law suit” or “legal action, including all proceedings therein; a contest in a court of law for the purpose of enforcing a right or seeking a remedy.”<sup>3</sup> The litigator is therefore, one who can plead another’s cause by means of a legal action before a court or tribunal. Accordingly, the mark of the trial advocate is very narrow, limited to utilizing the skills necessary to successfully encounter the adversarial activities endemic to the courtroom.

Mr. Chief Justice Burger views the lawyer in a different perspective. He observed that, “[l]awyers are—or should be—society’s peacemakers, problem solvers and stabilizers. . . . [t]he common law system lends itself to gradual evolutionary change to meet the changing needs of people. Lawyers can fulfill that high mission only if they are properly trained.”<sup>4</sup> Lawyers are more than mechanics who profess that they are competently equipped to advocate because of a secure knowledge of procedure and tactics. Mr. Chief Justice Burger views advocacy as a means by which justice is preserved and society’s needs met—a means by which the needs of individuals are fulfilled consistent with the dynamics of a changing society.<sup>5</sup>

The skills required are more than those relevant to success in the courtroom. Rather, they are the tools of everyday practice which coalesce in the adversary setting. A simple example of this is the art of interviewing. In the words of the Chief Justice:

The shortcoming of today’s law graduate lies not in a deficient knowledge of law but that he has little, if any, training in

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1. BLACK’S LAW DICTIONARY 51 (5th ed. 1979).

2. J. FRANK, COURTS ON TRIAL 5 (1950).

3. BLACK’S LAW DICTIONARY 51 (5th ed. 1979).

4. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 236 (1973) (hereinafter cited as Burger, *Special Skills*).

5. Burger, *The Future of Legal Education* in CLEPR, SELECTED READINGS IN CLINICAL EDUCATION 53-54 (1973).

dealing with facts or people—the stuff of which cases are really made. It is a rare graduate, for example, who knows how to ask questions—simple, single questions, one at a time, in order to develop facts in evidence either in interviewing a witness or examining him in a courtroom. And a lawyer who cannot do that cannot perform properly—in or out of court.<sup>6</sup>

The effective advocate then, must be successful outside of the courtroom as well as in it. The skills required in court are basic skills of practice and not exclusive skills of the courtroom. It is in the courtroom, however, that the full range of a lawyer's skills are tested, in an intense and demanding environment in which all of the advocate's skills become integrated. There is no other point at which the lawyer's conduct becomes so visibly essential to the judicial process. These practical and obvious courtroom skills are highlighted versions of what every lawyer must possess to represent his clients' interests effectively. The ability to perform in the courtroom is an essential aspect of lawyering—whether passively, through awareness of its demands, or actively, through practice.

Lawyer training today has virtually ignored the need for skillful courtroom advocacy. The result has been a hodge-podge of learning experiences lacking overall logic, form, or direction. In attempting to resolve this problem, there is a need to place the concept of lawyer training and education into "contextual completeness." Insight into one's role as counselor, advocate, or mediator can be gained only through an understanding of the epitome of legal representation—the adversary courtroom setting, in which justice is defined by the efforts and abilities of the participants.<sup>7</sup>

The current state of trial advocacy, and more generally, the legal profession, has been justly criticized with respect to practical skills training. Mr. Justice Clark noted that: "For many years, we have allowed attorneys to learn the art of advocacy haphazardly, giving little consideration to the consequences of our neglect. Trial and error in-

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6. *Id.*

7. See Tauro, *Graduate Law School Training in Trial Advocacy: A New Solution to an Old Problem*, 56 B.U.L. REV. 635 (1976).

Given that litigation may be foreign to their [the law faculty's] own experience and areas of interest and learning, such hesitation is natural and understandable. However, I believe this reluctance is being dissipated by the growing realization that there is an urgent need for trial lawyers and that trial practice supplements and enriches traditional study, giving it coherence within a practical, socially responsive framework.

*Id.* at 642.

struction invariably results in error-ridden trials.”<sup>8</sup>

While the law student must develop superior analytical skills and a fundamental understanding of the law, he must also learn how to put these skills to work. The young attorney who fails in this is as helpless in his practice as a dentist who recognizes a cavity but doesn’t know how to fill it.<sup>9</sup>

Mr. Chief Justice Burger, one of the most vocal critics of modern courtroom advocacy, raised professional eyebrows in his 1973 Sonnett Lecture at Fordham University when he noted that from one third to one half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation.<sup>10</sup>

The integrity of the legal profession is at stake. The failure to recognize the significance of inadequate courtroom advocacy has already subjected the legal profession to greater degrees of scrutiny and social criticism. The effect is more directly felt by the individual client, as well as the courts which must tolerate incompetent legal advocacy. If the lawyer, society’s mediator, cannot effectively utilize the tools of his trade, the functions he purports to serve will remain inadequately executed.

## II. THE SKILLS OF TRIAL ADVOCACY

The challenge to the neophyte trial advocate is twofold. Lawyer’s must learn courtroom skills and then integrate them into their repertoire. For some, the skills of the marginal trial advocate parallel his or her ability to perform specific lawyer-like of legal acts.<sup>11</sup> Others

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8. Clark, *The Continuing Challenge of Advocacy*, 16 WASHBURN L.J. 243, 248 (1977).

9. *Id.* at 244.

10. Whatever the legal issues of claims, the indispensable element in the trial of a case is a minimally adequate advocate for each litigant. Many judges in general jurisdiction trial courts have stated to me that fewer than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent. I draw this from conversations extending over the past twelve to fifteen years at judicial meetings and seminars, with literally hundreds of judges and experienced trial lawyers. It would be safer to pick a middle ground. . . .

Burger, *Special Skills*, *supra* note 4, at 234 (citations omitted). In agreement is Justice Clark who says that:

Newcomers to the profession are trained in skills better befitting the legal scholar or appellate judge than the trial practitioner. Certainly we need all three. But the heart of the law is in the courtroom give and take. Any effort falling short of providing a substantial body of competent trial attorneys will ultimately take its toll on our system of justice.

Clark, *The Continuing Challenge of Advocacy*, 16 WASHBURN L.J. 243, 249 (1978).

11. One writer suggests the new lawyer should be able to:

. . . examine a title; write a deed, and other customary instruments; close a real estate deal; institute and prosecute suits, including the statutory proceedings of his jurisdiction;

contend that lawyer-like acts do not constitute skills and recommend teaching more client-oriented services. Still others, however, have a narrower perspective and examine only the specifics of courtroom practice. The ability to conduct direct and cross-examination, deliver oral argument, make motions and objections, and control witnesses, are all crucial to competent courtroom performance. Mr. Chief Justice Burger criticized the abominable lack of courtroom proficiency:

1. The thousands of trial transcripts I have reviewed show that a majority of the lawyers have never learned the seemingly simple but actually difficult art of asking questions so as to develop concrete images for the fact triers and to do so in conformity with rules of evidence.
2. Few lawyers have really learned the art of cross-examination, including the high art of when not to cross-examine.
3. The rules of evidence generally forbid leading questions, but when there are simple undisputed facts, the leading questions rule need not apply. Inexperienced lawyers waste time making objections to simple, acceptable questions, on uncontested factual matters.
4. Inexperienced lawyers are often unaware that "inflammatory" exhibits such as weapons or bloody clothes should not be exposed to a juror's sight until they are offered in evidence. . . . Such examples could be multiplied without limit.<sup>12</sup>

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defend a criminal; prepare individual, partnership and fiduciary tax returns; work out an estate plan; prepare and probate a will; administer an estate, with federal and state returns, etc.; and form, operate and dissolve an individual proprietorship, a partnership and a corporation . . .

Berryhill, *Clinical Education—A Golden Dancer?*, 13 U. OF RICH. L. REV. 69, 79 (1978) (hereinafter cited as Berryhill, *Clinical Education*). Others contend that acts do not constitute skills and call for teaching of standards for the performance of the basic skills involved in service to a client, such as: "interviewing, collecting facts, counseling, writing certain basic documents including pleadings, preparing for trial and conducting trial matters . . ." *Id.*

Still others, however, draw a narrower focus, looking to the specifics of courtroom practice. Professor Joseph Tauro, formerly Chief Justice of the Massachusetts Supreme Judicial Court has commented upon the shortcomings of the inexperienced lawyer. He observes that:

[L]awyers lacking in basic training and experience are often thrust into situations in which they are called upon to try cases beyond their capabilities. In a good faith attempt to meet this challenge, young inexperienced attorneys often have difficulty eliciting testimony and making necessary arguments in a consistent persuasive manner. They are apt to make unfounded motions and to engage in dilatory tactics such as asking needless questions in the direct examination of witnesses and repeatedly making unnecessary and ill-advised objections. Conversely, inexperienced attorneys often do not object when appropriate or omit essential elements of their cases, thus failing to preserve exceptions or lay proper foundations for the introduction of evidence.

Tauro, *Graduate Law School Training in Trial Advocacy: A New Solution to an Old Problem*, 56 B.U.L. REV. 635, 636 n.5 (1976).

12. Burger, *Special Skills*, *supra* note 4, at 234. "An inexperienced prosecutor wasted an hour

Courtroom activity does not exist in a vacuum. The art of eliciting facts from the witness on the stand is dependent on the lawyer's ability to elicit facts during the pre-trial interview with the witness. The legal knowledge required to make objections or argue motions is the same knowledge required to negotiate or mediate effectively. The ability of lawyers to communicate effectively is discernible in their actions as intermediaries, counselors, and advocates. The insight which is so vital to an effective closing argument demands analysis and reason, both central to the advocacy process.

All commonly recognized courtroom skills are refined expressions of noncourtroom skills. In essence, courtroom skills are the product of an intense application of basic skills which the lawyer uses daily. Such skills are seldom developed naturally, but are learned and refined through deliberate efforts.

To understand this more clearly it is necessary to review the components of a trial by examining the essential activities demanded of the competent attorney. As evidenced from the remarks of experienced trial advocates, the activities of the courtroom can be divided into eight basic categories.<sup>13</sup>

#### A. *Preparation for Trial*

The first and perhaps the most demanding activity is that which precedes the actual trial—preparation.<sup>14</sup> Preparation for trial involves a vast array of individual considerations, some of greater complexity than the litigation itself. Even the simplest case requires files that are readily accessible and easily interpreted. Organization of the total paperwork generated by a case requires more than a manila folder and metal clips. The importance of each document, from evidentiary materials to pleadings, must be considered and each must be systematically organized, to be available when needed in the courtroom. The ability to logically collate a wide variety of materials is the essential

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on the historical development of the fingerprint identification process discovered by the frenchman Bertillon, until it finally developed that there was no contested issue." *Id.*

13. These categories will be amplified in the text: trial preparation; jury voir dire; opening statement; direct examination; cross-examination; making objections; introducing exhibits; and making the closing argument.

14. See J. GOLDSTEIN & F. LANE, GOLDSTEIN TRIAL TECHNIQUE § 1.01-29 (2d ed. 1969); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 85-172 (1980); Yanello, *Trial Advocacy on Trial*, 7 OHIO N.L. REV. 3, 6-8 (1980); Huaron, *Utilizing Support Systems in Pre-Trial Fact Organization*, 15:12 TRIAL 14 (1979); Berryhill, *Clinical Education*, *supra* note 11, at 69.

skill of organization. The motivating factor is self-discipline, tempered with the ability to analyze and interpret both facts and law.

The effective presentation of the case-in-chief requires that the lawyer develop a lay theory.<sup>15</sup> This underlying theory integrates the scattered components of the case into a logical and intelligible whole and gives meaning to the events of trial. Adherence to this unifying theory throughout trial facilitates the trier's understanding of the case. Theory development is a complex task requiring analysis of each element of the cause of action, methods of proof, contradictory facts and anticipation of potential evidentiary problems. Examination of witnesses, admission of evidence, and integration of the adversary's facts must conform to a consistent and pervasive theory. Without exaggerating the client's claim, the advocate should emphasize and develop the theory to present the case in its most favorable light. Analysis and issue identification are the predominant skills employed during theory development. To a lesser extent, the ability to weigh and organize all factors is fundamental to this activity.

The development of a trial notebook<sup>16</sup> and a reliable filing system involves more than the use of a three-ring binder. Rather, the trial notebook is a microcosm of the case-in-chief, a critical guide by which the trial is orchestrated. The complete trial "script," from a recitation of the facts to the anticipated motions, discovery, opening statements, and points to be made during closing, are placed in the trial notebook. The essential skills of this process are similar to those of organization, but they also include the skills of research, writing, fact-finding and interviewing.

In sum, the skills of this pre-trial preparatory process are fundamentally similar regardless of whether preparation involves witnesses or development of a lay theory. Fact finding, issue identification, analysis, research, and writing are all important skills in this first step of advocacy.

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15. An advocate's "lay theory" of a case is merely a version of the facts told in the most favorable light to his client. The effective advocate strives to introduce evidence throughout the trial which will chronologically support his story or lay theory. In so doing, the advocate continually builds upon the facts and evidence towards a conclusion designed to elicit a favorable jury verdict.

16. A. CONE & V. LAWYER, *THE ART OF PERSUASION IN LITIGATION* 225-40 (1966); T. GOLDSTEIN & F. LANE, *GOLDSTEIN TRIAL TECHNIQUE* § 1.20-28 (2d ed. 1969).



## B. *Voir Dire*

When the preparatory stage is complete and the strategy planned, the trial begins. The first phase of any trial is jury selection. Voir dire of the jury panel involves more than standing before a group of people and asking questions. The ability to communicate, to speak effectively, and most importantly, the ability to judge individual character, are skills vital to the selection process. Many have described voir dire as an art form,<sup>17</sup> designed to subtly present prospective jurors with a glimpse of the case while the lawyer attempts to discover juror prejudice or bias. Voir dire is an advocate's sole opportunity to partially select the audience who will critique his script as the trial progresses.

## C. *Opening Statement*

The trial commences with the presentation of an opening statement.<sup>18</sup> The opening statement is crucial because it is at this point that the trier of fact receives its first impressions, not only of the case, but of counsel, as he or she assumes the adversary role. An attorney's opening statement presents a golden opportunity to exercise legal salesmanship in giving the jury a preview of what he intends to prove during the course of the trial.<sup>19</sup> It "should be logical and coherent and it should appeal to the jury's innate sense of justice."<sup>20</sup> An attorney's first words introduce the "plot," or theory of the case, and they should be persuasively directed in order to gain audience empathy.<sup>21</sup>

"Experience teaches us that the effective opening statements invariably have the same recurring components. They are delivered forcefully, state the facts of the case, and are organized in a manner that communicates clearly to the jury."<sup>22</sup> Communication skills, organiza-

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17. J. McELHANEY, *EFFECTIVE LITIGATION* 109 (1974). See also R. KEETON, *TRIAL TACTICS AND METHODS* 253-63 (2d ed. 1973); Blinder, *Picking Juries*, 1 *TRIAL DIPLOMACY* J. 1, 8 (1978); Brams & Davis, *A Game Theory Approach to Jury Selection*, 12:12 *TRIAL* 47 (1976); Cartwright, *Jury Selection*, 13:13 *TRIAL* 28 (1977); Gouldin, *The Civil Jury Trial: Jury Selection*, (pt. 2) reprinted in *CIVIL TRIAL PRACTICE MANUAL* 127 (2d ed. 1972).

18. For comments on effective opening statements, see: A. CONE & V. LAWYER, *THE ART OF PERSUASION IN LITIGATION* 265-80 (1966); La Marca, *Effective Techniques of Opening Statements*, 1 *TRIAL DIPLOMACY* J. 1, 14 (1978); La Marca, *Opening Statements—Effective Technique*, 21 *TRIAL LAW. GUIDE* 446 (1978).

19. J. McELHANEY, *EFFECTIVE LITIGATION* 110 (1973).

20. *Id.*

21. *Id.*

22. T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 49 (1980).

tion, and the techniques of timing and positioning are the skills of the opening statement.

#### D. *Direct Examination*

A lawyer's creative talents are rigorously tested when the dialogue commences. Just as the actor's dialogue reveals the play's plot, the lawyer's questions and the witness' responses reveal the theme designed to elicit a favorable verdict.

A successful direct examination<sup>23</sup> focuses upon a clear and logical progression of the evidence which is intended to convey information that can be easily understood by the jury. The direct examination of a witness is an extension of the decision-making process. Each question poses a new option, and counsel must make spontaneous decisions based on the answers given to previous inquiry. Proceeding blindly on a narrow preplanned course of questioning creates the danger of unanticipated responses which in some instances may be harmful to the case. The lawyer, however, must adhere to an overall plan. The failure to do so may confuse the jury so that it may lose sight of crucial evidence in evaluating extraneous material given by a rambling witness in response to superfluous questions. In short, the advocate must strike a balance between his established game plan and the need to change direction based upon new information.

At the base of any good examination is the ability to communicate. Questioning, and the art of courtroom positioning, all play important roles in establishing an effective lawyer-witness dialogue.

#### E. *Objections and Introduction of Exhibits*

Integral to every case-in-chief is a working knowledge of substantive law, procedure, and evidence. Throughout the course of trial, questions asked and answered and exhibits tendered may be improper.<sup>24</sup> Timely objections to inquiries, testimony, or evidence are essential to effective advocacy.<sup>25</sup> Late objections are often worse than objections not made at all.<sup>26</sup> Technique in the delivery of the objection

23. For additional material on direct examination, see J. BAER & S. BALICER, CROSS-EXAMINATION AND SUMMATION 26-47 (1948); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 85-172 (1980); Colley, *Principles of Direct Examination*, 2 TRIAL DIPLOMACY J. 1, 13 (1979).

24. See A. CONE & V. LAWYER, THE ART OF PERSUASION IN LITIGATION 283-90, 311-27 (1966); J. McELHANEY, EFFECTIVE LITIGATION 16-23 (1974).

25. See FED. R. EVID. 103(a)(1).

26. Making an objection to inquiry, testimony or evidence is part and parcel to the advocate's

is just as important as the substance of that objection. Additionally, the introduction of exhibits and use of depositions demand expertise in incorporating such into the mainstream of the advocate's presentation.

#### F. *Cross-examination*

Cross-examination<sup>27</sup> can be a most spectacular trial event. It affords an opportunity "for the most striking use of an aptitude for incisive thought and a sense of the dramatic."<sup>28</sup> The effective attorney will use cross-examination both to discredit the opposition's witness and to elicit facts favorable to the theory of his case.

The same skills of questioning used in direct examination must be used in cross-examination to forcibly elicit information which may be unknown to the lawyer but which might prove to be damaging to the case-in-chief or to the credibility of a hostile witness. Obviously, the ability to listen is a crucial skill of cross-examination. Counsel must use discretion in cross-examining a witness, however, since an unreasoned or indeliberate question may bolster the credibility of a witness instead of destroying that credibility.

The key to successful cross-examination is preparation. The advocate must be sufficiently familiar with the facts of the case so that he can instantly recognize an inconsistent response and use it spontaneously to his own advantage.

#### G. *Closing Arguments*

The conclusion of a trial is often more fiery than cross-examination. Closing argument<sup>29</sup> is a time to optimize the use of oral skills of persuasion and speechmaking. A favorable and lasting impression is as important as a good first impression. Accordingly, it is imperative that the lawyer's closing argument forcefully present his or her position on the contested issue and that it represent the reasons why that position should prevail.<sup>30</sup>

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role. Interposing a late objection is likely to be overruled and will only emphasize the point sought to be excluded.

27. See generally J. BAER & S. BALICER, *CROSS-EXAMINATION AND SUMMATION* 48-62 (1948); Burgess, *Principles and Techniques of Cross-Examination*, 2:4 TRIAL DIPLOMACY J. 19 (1979); T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 237-94, 362-92 (1980).

28. R. KEETON, *TRIAL TACTICS AND METHODS* 94 (2d ed. 1973).

29. For further information on effective closing arguments, see A. CONE & V. LAWYER, *THE ART OF PERSUASION IN LITIGATION* 329-40 (1966); Belli, *Techniques of Final Argument*, 2:4 TRIAL DIPLOMACY J. 34 (1979); Head, *Final Argument*, 2:20 TRIAL DIPLOMACY J. 27 (1979).

30. T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 49 (1980).

The closing argument should be a planned and organized editorial comment on the evidence. It should incorporate the opening statement and should reflect the lay theory previously established, while at the same time undermining the opposing theory. Again, the basic skills remain the same. Effective communication, poise, confidence, a logically planned presentation, and deliberate, reasoned analysis, are crucial to the effectiveness of the closing argument.

#### H. *Skills Analysis of the Trial Process*

Close scrutiny of the entire trial process reveals three categories of skills and activities.<sup>31</sup> The most basic category encompasses those skills foundational to the advocacy process. It is upon these that the more specific skills and activities are built. Preparation skills comprise the second category and establish a second level of expertise. The actual

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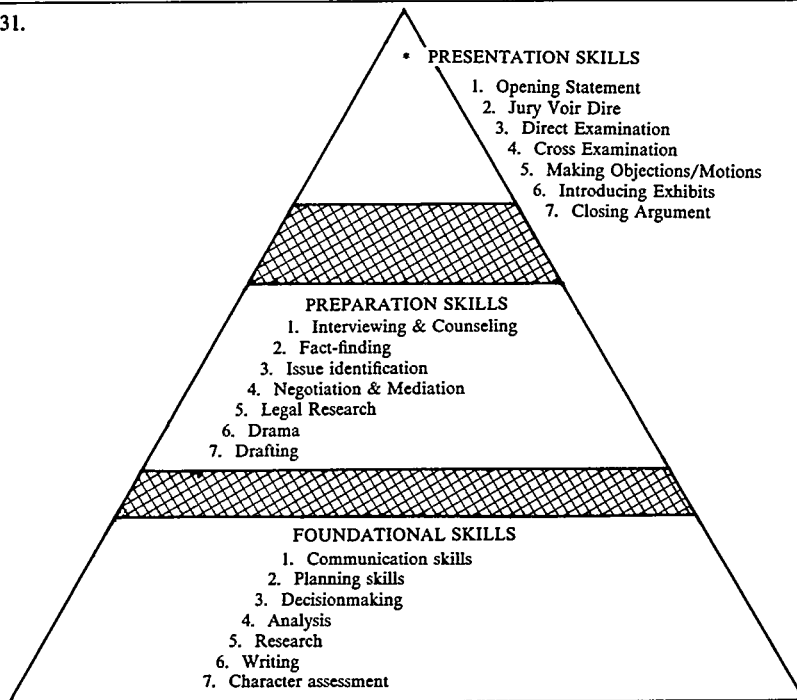


FIGURE ONE.

Depicting the pyramidal basis for development of advocacy [presentation] skills. The checked areas represent the proposition that between any two areas there will be interchange and reinforcement of skills more properly found in the next category.

activities of the courtroom, or the presentation skills form the last category.

Foundational skills are instrumental skills. They are not the sought-after result, but are employed in conjunction with the other more functional activities. Such skills include communication skills; planning; decision-making; analysis; research; writing; and, character assessment. All are important prerequisites to the more specific behavior of the lawyering process.

Preparation skills specifically relate to the practice of law and are more narrowly outlined than their underlying counterparts. They form the basis for the verbal skills and very specific activities of the courtroom. In essence, they are integral components of the lawyering process and find expression throughout practice. They include interviewing and counseling; fact finding; issue identification; negotiation and mediation; legal research; legal drafting; and, drama.

Presentation skills are specifically used in the courtroom. They are crucial to the trial process and are the vehicles through which foundational and preparation skills are exercised. As seen in figure one, presentation skills are the product of the interaction of both foundational and preparation skills. Absent the development of foundational and the more specific preparation skills, trial advocacy may fail to meet the high expectations demanded by society.

### III. ACQUIRING ADVOCACY SKILLS

The acquisition of advocacy skills is a development with three distinct but inter-related stages. As mentioned earlier, the first stage is the pre-law program. The second stage is law school, and the third stage practical experience. Just as advocacy skills are built on foundational skills, legal education is built on a foundation of undergraduate training.

#### A. *The Undergraduate Pre-Law Program*

##### 1. Tradition

Undergraduate education became a prerequisite to enter law school approximately forty years ago,<sup>32</sup> and currently serves a dual purpose. It helps to formulate basic foundational skills and indicate potential law school candidates. The formality of pre-law programs

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32. Berryhill, *Clinical Educational*, *supra* note 11, at 72 n.6.

varies from institution to institution. In some schools, pre-law activities exist only in the form of extra-curricular clubs with little academic foundation. Students often enroll in a pre-law major but are advised to pursue political science, history or similar fields of study. Formal course work is rarely offered concerning legal study, the profession, or lawyering.

In other institutions, the pre-law program is a structured academic experience, complete with course outlines and faculty advisors. In many respects, however, the academic experience is much the same as that of a less structured program. The purpose of the pre-law program has traditionally been to prepare the student for an academic experience in law school. To accomplish this, the student is placed in an academic major which requires him to use the foundational skills of analysis, writing, and research, the tools thought most useful to potential law students. Neither undergraduate nor legal education, however, place sufficient emphasis upon other skills essential to the successful practice of law much less trial advocacy.

## 2. The Dual Function—Education and Decision

From an educational perspective, the potential of an organized pre-law program is great. Rather than direct students into traditional majors, a concerted effort both to answer fundamental career questions and develop foundational skills should be undertaken.

As a result of traditional efforts, the student has been given little guidance or direction concerning his decision to enter law school. He has virtually no substantive information on which he can rely to make vitally important decisions. Today's pre-law program is an attempt to infuse skills without any direct exposure to the study of law, the legal profession, or lawyering.

The failure of the pre-law curriculum to prepare the student adequately for law school and to provide sufficient grounding in foundational skills creates a danger of unchecked ideals. The student who enters school full of grand expectations which remain unaltered through undergraduate education is a student who has potential for great disappointment. For those who remain in law school and enter the realm of trial advocacy, such disappointment may find expression in poor courtroom performance.

From the educational perspective, then, the pre-law curriculum must fulfill its appointed mission. It must respond to the need for ade-

quate development of foundational advocacy skills, as well as to the need for sufficient information about law study and the profession. Only in this way can there truly be a pre-law program.

### 3. Litigation and Observation

In sum, the pre-law program has failed where it had potential for great success. In response to the demand for greater understanding of lawyering and the legal profession, the pre-law student should have a structured opportunity to view actual litigation.

One method to better utilize the pre-law education is to develop a "participant-observer" model within the curriculum. The student would observe the activity of the trial setting and discover for himself the skills demanded of the competent advocate. This exposure would also allow the student to compare his ideals with the world of lawyering. In short, the opportunity to study litigation at the pre-law stage is an opportunity to discover if this aspect of lawyering is in fact desirable, thus building a foundation for later career direction.

## B. *The Law School*

### 1. Tradition

Law school is the most basic component of legal training. It is during this time that the lawyer is exposed to legal principles and the rigors of "thinking like a lawyer."<sup>33</sup> To a lesser extent, the law student is also exposed to "the lawyering process"<sup>34</sup> and the profession.

The roots of the contemporary law school can be traced to Dean Langdell.<sup>35</sup>

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33. Seeing the law as a science, he [Langdell] created the scientific approach to law study with the case method at its core. Prior to this time, apprenticeship, accompanied by readings in the law office, was the predominant means of training American lawyers. Law schools existed both at Universities and as independent proprietary entities, but were merely supplements to apprenticeship training. Law study, being tied closely to the study of philosophy, political economy and societal concerns was viewed by many as liberal art and was aimed at preparing students for law practice. The case method of teaching rapidly became a kind of religion—the analysis of legal rules an end in itself. To train one "to think like a lawyer" because the foremost objective of every law school.

Berryhill, *Clinical Education*, *supra* note 11, at 71.

34. The lawyer of the day needed to be more adaptable and was no longer as concerned with black-letter law. The case method was uniquely suited to meet these needs. It emphasized reasoning skills rather than substantive law and was based on a dynamic, rather than static view of the law as a tool for social change.

Tauro, *Graduate Law School Training in Dual Advocacy: A New Solution to an Old Problem*, 56 B.U.L. REV. 635, 640 (1976).

35. Frank characterized Langdell as a "brilliant neurotic." When Langdell was himself a law student he was almost constantly in the law library. He served for several years as

The predominant method of instruction in the law school is the case method, first developed as a technique for law teaching by Dean Langdell in 1870, and since extensively employed in virtually all American law schools. The case method is a realistic method which uses the careful examination of judicial opinions as a focus for study and as a starting point for classroom discussion. . . . The case method also introduces the student to the analytical techniques which lawyers use to sort the relevant from the irrelevant, separate reasoning from rationalization, and distinguish solid principle from speculation. The case method is a flexible instrument . . . .<sup>36</sup>

"The case method of teaching rapidly became a kind of religion—the analysis of legal rules an end in itself. To train one to think like a lawyer became the foremost objective of almost every law school."<sup>37</sup>

The case method taught students to "think like a lawyer," but left them incapable of acting like a lawyer.<sup>38</sup> In the view of one jurist:

The Langdell spirit choked American legal education. . . . It tended to force the lawyer to place primary emphasis on the library, to regard a collection of books as the heart of the school. . . .

Langdell invented, and our leading law schools still employ, the so-called "case system." That is, the students are supposed to study cases. They do not. They study, almost entirely, upper-court opinions. Any such opinion, however, is not a case, but a small fraction of a case, its tail end.<sup>39</sup>

The solution to the problems raised by the case method would seem to rest with the development of practical skills, but emphasizing practical skills while ignoring the traditional approach would be catastrophic. A combination of the practical and traditional approaches is required.<sup>40</sup>

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an assistant librarian. He slept, at times, on the library table. One of his friends found him one day absorbed in an ancient law-book. "As he drew near," we are told, "Langdell looked up and said, in a tone of mingled exhilaration and regret, and with an emphatic gesture, "Oh, if only I could have lived in the time of the Plantagenets!"

J. FRANK, COURTS ON TRIAL 225 (1950).

36. J. OSBORN, THE PAPER CHASE (1971) (quoting the official register of the Harvard Law School Catalogue (1970)).

37. See Berryhill, *Clinical Education*, *supra* note 11, at 71, 90-91.

38. *Id.* at 71.

39. J. FRANK, COURTS ON TRIAL 227 (1950).

40. See generally Moran, *Formal Training in the United States*, in LAW OFFICE EFFICIENCY 24 (1972); W. PINCUS, CLINICAL EDUCATION FOR LAW STUDENTS (1980); 12:11 TRIAL 23, 25 (1976).



## 2. Toward Greater Practicality—Education

There is great potential for training in preparation and presentation skills within the established law school curriculum. In the words of Judge Kaufman, "trial recreation, trial simulation, video techniques, and other visual aids . . . all can be integrated into a course designed to develop the various courtroom skills."<sup>41</sup>

Integrating practical training with established courses is not an impossible task. A course in evidence, for example, could include both an academic discussion of a hearsay objection and student participation in making the objection. Similarly, a course in civil procedure could require both discussion about and preparation of a motion for summary judgment. An approach of this kind would fundamentally change legal education.

The presence of some skills-related courses can move a curriculum even further toward the practical. Courses like trial practice attempt to squeeze the rudiments of actual trial presentation into one or two semesters. Moot court emphasizes legal research, writing, and the skills of appellate oral presentation. Additionally, some law schools have designed a new format of seminar classes to relieve the tension between the competing interests of lawyer training and scholarship.<sup>42</sup>

During the late sixties, a more significant apprentice-like effort returned to legal education in the form of clinical programs.<sup>43</sup> Clinical education attempts to place the student in situations where he can both act and think like a lawyer. This method provides a new setting in which the traditionally trained student may learn practical skills.

Several methods of clinical training are used. Some schools have developed in-house clinics which offer controlled experiences in a variety of practice skills.<sup>44</sup> The in-house clinic is operated by the law school and its primary benefit is direct supervision of student practice. In this way, students receive individual attention while developing practical skills.

Other schools use farm-out clinics which place student interns in

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41. Kaufman, *Advocacy as Craft—There is More to Law School Than a "Paper Chase,"* 28 Sw. L.J. 495, 499 (1974).

42. See Berryhill, *Clinical Education*, *supra* note 11, at 90-91.

43. This effort was promoted by the Ford Foundation sponsored Council on Legal Education for Professional Responsibility which opened its doors in 1968.

44. Anderson, *Continuing Professional Education*, in THE LAWYER'S HANDBOOK § A 4-5 (rev. ed. Supp. 1979). See also McCauliff, *Trial Advocacy: Improving the Quality of Legal Services Through Continuing Education Courses*, 30 JOURNAL OF LEGAL EDUC., 536 (1980).

selected legal settings throughout the community.<sup>45</sup> This approach offers both the advantage and disadvantage of practitioner supervision. The student, while gaining exposure to a real practice, may unfortunately find himself totally dependent on the practitioner for the activities undertaken, resulting in overly narrow or overly broad skills development. The opportunity to learn in the less structured environment of practice holds promise for a wide range of activity, but also holds potential for a diminished learning experience. This method offers the real world experience to a large number of students at a cost less than in-house methods, but often times sacrificing close supervision. Some programs have attempted to remedy the problems with partial payment of supervising attorneys, but for the most part, the farm-out method remains an entity separate from the law school.

The importance of clinical education cannot be underestimated. It is one of the few solid attempts to integrate practical skills into legal education. The fact remains, however, that "even minimal clinical experience has yet to be established as a prerequisite to graduation."<sup>46</sup> Thus, while traditional methods may be undergoing change, law schools continue to emphasize academic skills, at the expense of skills vital to the advocacy process.

### 3. Litigation and Observation

While the law school curriculum may be changing with respect to development of practical skills, little has been accomplished in the area of exposure to litigation, a must for development of adequate advocacy skills. The courtroom for many law students is a foreign place. In many institutions, even trial advocacy courses are not required, and most students do not take it upon themselves to venture into the local courthouse. One writer observes: "No post-graduate internship is required of lawyers. It is estimated that about two thirds of all lawyers begin practice without any face-to-face dealing with clients."<sup>47</sup>

A program established at Northwestern University provides a workable solution. In that effort, a state criminal trial was actually "held at the law school to assure maximum attendance and avoid

45. Anderson, *Continuing Professional Education*, in THE LAWYER'S HANDBOOK § A 4-5 (rev. ed. Supp. 1979).

46. Clark, *The Continuing Challenge of Advocacy*, 16 WASHBURN L.J. 243, 244 (1977).

47. Stern, *Are you Enrolled in a Finishing School for the Establishment?*, 16 STUDENT LAW., 43 (1980).

problems of students commuting.”<sup>48</sup> The trial comprised the first semester of the advocacy course and the second semester consisted of class discussion of counsels’ performance during the various portions of the litigation. In this experience involves students in the action and provides a first hand opportunity to observe advocacy at work. The majority of law schools unfortunately do not offer similar experiences.

### C. *The Practicing Bar*

#### 1. Tradition and Litigation

This third stage, entry into the profession, is the culmination of all of the skills developed during the first and second stages. Here, the lawyer as a professional must begin to use his legal knowledge and skill in service to his client. Exposure to intense legal activities demands the utmost in skill and learning. Continued development of skills will follow patterns acquired during school and it is here that true learning occurs.

Traditionally, novice trial practitioners develop skills under the supervision of others, or by the trial and error method. Supervision occurs at different levels of intensity. If the new attorney is fortunate enough to work for a large firm he may be part of an in-house training effort. Many firms maintain a rotation policy administered by a specific member of the firm. New associates usually spend from six months to a year working in the litigation department. The new associate is then rotated into corporate or other work. Some firms simply assign the new associate to one or two partners. Continued legal education is limited to the demands of the respective partner’s current caseload.<sup>49</sup>

The trial and error method is more simplistic. The new lawyer is on his or her own and learns through success and failure. Many well established members of the trial bar firmly believe that the only way to learn is through such experience. As one judge notes: “The difficulty with this view is that it overlooks the obvious fact that this method has not solved the problem in the past and holds no real hope for the future.”<sup>50</sup>

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48. Aspen, *The Courthouse as a Classroom*, 14 TRIAL 20, 21 (1978).

49. Ordovery, *Law Firm Training Program: Avoiding Trial and Error*, 5 LITIGATION 16, 17 (Summer 1979).

50. Tauro, *Graduate Law School Training in Trial Advocacy: A New Solution to an Old Problem*, 56 B.U.L. REV. 635, 643 (1976).

The trial and error method offers no opportunity for the lawyer to learn from his mistakes. While the new lawyer continues making mistakes, the judge or opposing counsel will usually not bring them to the erring attorney's attention. Neither occupies the role of instructor and neither wishes to suffer through what might prove to be an extremely embarrassing moment.

Tradition, then, leaves little room for practical education. The answer lies in external supervision, and not in self taught performance.

## 2. Education and Litigation

Educational methods are increasing as the demand for courtroom competency grows. Seminars on trial advocacy and continuing practice institutes offer attorneys the opportunity to refresh existing skills or develop new ones. Correspondingly, in-house programs have been undertaken by large firms and in some instances, prosecuting or defenders' offices. Although every law firm trains its associates differently, five basic types of training programs emerge: the long term integrated program; the intensive program; the combined in-house program; the outside program; and the rotation program.

The long term integrated program is an on-going effort, integrated into the working schedule of the firm which utilizes Saturday or lunch-hour sessions. The intensive program is a short-term burst of activity which resembles a cram session. The combined program<sup>51</sup> uses both in-house instruction and outside efforts.<sup>52</sup> Outside opportunities include refreshers and further development of existing trial skills and can be offered as single seminars or on a continuing basis.<sup>53</sup> Significantly, these intensified programs offer speakers and an agenda which parallel law school curricula. The effectiveness of such efforts, however, cannot be measured accurately.

## IV. DISCUSSION

In this essay we have seen the skills of the courtroom and the prerequisites to their use. Foundation skills are crucial to advocacy specifically and to law practice generally. Preparation skills directly underpin the advocate's courtroom performance. The skills of the

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51. *Id.*

52. The National Institute for Trial Advocacy and the Hastings College of Trial and Appellate Advocacy employ both the long-term integrated program and the intensive program.

53. *Id.*

courtroom, the presentation skills, are the culmination of daily practice activity. Inadequate development of foundational and preparation skills will inevitably lead to inadequate courtroom performance.

In the course of this article we have examined each of the stages of lawyer preparation. In the pre-law effort, we found a program highly reflective of traditional law school values. Primary emphasis is placed upon the limited skills of analysis, research, and writing. The other skills, foundational to advocacy, are all but ignored. Similarly, such skills are not emphasized during law school training and thereby go undiscovered. The law school, while concentrating on the attendant skills of the case method, has shunned development of the remaining preparation skills so necessary to courtroom competency. Little formal training is offered in areas such as interviewing and negotiation. Exposure to the courtroom is lost.

The culmination of advocacy skills, as seen by their use, is found as one enters practice. Unfortunately, unless such skills were developed during the earlier two stages, the chances for development during this time are few. In-house programs and practicing law institutes offer some hope, but by and large, the trial-and-error method prevails. The result is a trial bar incompetent to perform its task.

## V. CONCLUSION

Lawyer training should be an integrated process. The organized bar, the law school, and the pre-law program are too often isolated from one another, failing to recognize the interdependent benefits which can flow from uniform interaction.

Advocacy skills are not simply those of the courtroom. They are not the simple tasks of direct examination or closing argument, but are complex expressions of underlying skills, necessary to every day practice. To achieve superlative advocacy, superlative skills in lawyering practice must also be achieved. The law school must recognize the need for skills related both to the case method and to the courtroom. To do this effectively means recognizing the value of the pre-law effort and of the bar.

Those who seek to upgrade trial advocacy lose sight of the fact that lawyer training does not begin with law school, but with pre-law education. It ends, moreover, not with graduation, but continues through the lawyer's career.